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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARGARITA CASTORINO-HEER, Plaintiff and Appellant, v. JPMORGAN CHASE BANK, N.A. et al., Defendants and Respondents.	G050966 (Super. Ct. No. 30-2012-00590961) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed.

Stephen F. Lopez for Plaintiff and Appellant.

Bryan Cave, Glenn J. Plattner and Richard P. Steelman Jr., for Defendants and Respondents.

* * *

This is a wrongful foreclosure action. Plaintiff's sole claim is that when her mortgage was assigned to a securitized trust, the assignment was void, and thus the party that ultimately foreclosed on the house did not have authority to do so. Defendants filed a motion for summary judgment. Plaintiff's counsel failed to properly calendar the date the opposition was due. Upon belatedly realizing the mistake, counsel hurriedly prepared an opposition and filed it on the day of the hearing. The court refused to consider it. After oral argument, the court granted summary judgment. Four months later, plaintiff moved to set aside the judgment due to the attorney's mistake pursuant to Code of Civil Procedure section 473, subdivision (b).[1] Plaintiff's counsel filed a declaration of fault. The court denied the motion, and plaintiff appeals from that order.

We affirm. Plaintiff did not suffer a default, default judgment, or dismissal, and thus the mandatory relief provisions due to attorney fault were inapplicable. Additionally, the court was within its discretion in determining the mere fact of miscalendaring the date due to the press of business was not excusable neglect. Nor was plaintiff's counsel's error due to extrinsic fraud or mistake, and thus the court was not required to exercise its inherent equitable power to set aside the judgment.

FACTS

As the underlying facts are not relevant to the issue on appeal, we address them only briefly. Plaintiff took out an adjustable rate loan secured by a deed of trust on her home in the amount of $420,000. She subsequently took out a second loan, also secured by a deed of trust on her home, in the amount of $78,750.

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[1] All statutory references are to the Code of Civil Procedure unless otherwise stated. References to "section 473(b)" are to section 473, subdivision (b).

Plaintiff stopped making her payments in October 2010 because she could not afford them. After falling behind on her payments, plaintiff never paid the delinquent amount, as she was unable to do so.

In December 2011, defendant NDex West, LLC (NDex West) as agent for the beneficiary, recorded a notice of default. In February 2012, a broker's price opinion put the value of the property at $400,000. The amount of unpaid debt together with costs for the first loan at the time of the trustee's sale was $473,542.32. The amount of unpaid principal balance for the second loan at the time of the trustee's sale was $76,143.87. NDEx West conducted a trustee's sale in April 2012 and executed a trustee's deed upon sale granting all rights, title, and interest to the beneficiary. The trustee's deed upon sale was recorded in April 2012.

In August 2012 plaintiff filed her original complaint. She subsequently filed her first amended complaint (FAC) asserting claims for: (1) violation of 15 U.S.C. §1692 et seq. (Fair Debt Collection Practices Act); (2) wrongful foreclosure and (3) quiet title.

Defendants demurred to the FAC. The trial court sustained the demurrer without leave to amend as to the first cause of action and overruled it as to the second and third causes of action for wrongful foreclosure and quiet title. Defendants then answered the FAC.

On December 18, 2013, defendants moved for summary judgment. The hearing was set for March 3, 2014, and thus opposition was due on or before February 17, 2014. Plaintiff filed an opposition and response to defendants' separate statement of undisputed facts on March 3, 2014, the day of the hearing. Because the opposition papers were untimely, the court refused to consider them. The trial court granted summary judgment after "having reviewed all papers timely filed in support of and in opposition to the Motion and consider[ing] the oral argument of counsel . . . ." The trial court entered judgment on March 7, 2014 and notice of its entry was given on March 26, 2014.

On July 28, 2014, after substituting new counsel, plaintiff moved to have the judgment set aside pursuant to section 473. Plaintiff filed a declaration from her former counsel, stating, "I was understaffed and splitting my time between two offices. The amount of work that I had was beyond my capacity. On Friday February 28, 2014, in reviewing my file for this matter I realized the motion had not been properly calendared and as a result no opposition had been filed. I immediately prepared an opposition, which I attempted to file on March 3, 2014, the day of the hearing, which was obviously late." "The failure of [plaintiff] to file a timely opposition to this motion was solely due to my mistake in calendaring the dates for the motion."

The court denied the motion to set aside the judgment on September 8, 2014. Plaintiff filed her notice of appeal on November 3, 2014, from "the order . . . denying Plaintiff's motion from [*sic*] relief from default entered in the above-captioned matter entered on September 8, 2014 . . . ."

DISCUSSION

We begin by dispensing with a frivolous argument made by defendants. Defendants argue the notice of appeal was untimely. Their entire argument is premised on plaintiff appealing from the judgment. The notice of appeal could not be more clear, however, that plaintiff appeals from the postjudgment order denying the motion to set aside the judgment. Defendants do not contest the appealability of that order, nor could they. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 611 ["An order denying a motion to vacate a judgment or dismissal under section 473 is appealable"].) Nor do defendants contend the notice of appeal was untimely as to that order.

We thus turn to the merits of plaintiff's appeal. Plaintiff argues the court erred in three ways. First, plaintiff contends vacating the judgment was mandatory

pursuant to section 473 due to her former counsel's affidavit of fault. Second, she contends her former counsel's mistake was excusable neglect and the court abused its discretion in finding otherwise. Finally, she contends that the court erred in failing to exercise its inherent authority to vacate the judgment based on extrinsic fraud or mistake. We disagree on all three points.

Section 473(b) contains both discretionary and mandatory relief provisions. It begins with the discretionary: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a *judgment, dismissal, order, or other proceeding* taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (Italics added.) It then provides for mandatory relief from a narrower range of orders: "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (*Ibid.*)

Although no default, default judgment, or dismissal was entered in this case, plaintiff contends the mandatory relief provisions apply because her counsel's failure to file opposition papers to the summary judgment motion was akin to a default. Her argument is supported by *Avila v. Chua* (1997) 57 Cal.App.4th 860 (*Avila*).

In *Avila*, defendant moved for summary judgment, and plaintiff's attorney filed opposition papers one week late. (*Avila, supra,* 57 Cal.App.4th at 864.) At the hearing, the court denied a requested continuance, struck the opposition papers, and granted summary judgment. (*Ibid.*) Two days later, pursuant to section 473, plaintiff moved to vacate the grant of summary judgment. (*Id.* at p. 865.) "In an affidavit

attached to the motion, counsel for appellant declared that she erred in calendaring the date for her response to the motion by mistakenly calendaring a due date of seven days before the hearing. When she first discovered her error, on the morning of August 20, she called respondents' counsel in order to obtain a stipulation for a continuance, but was unable to obtain a stipulation. She then attempted to move ex parte for a continuance, but was unable to prevail due to the shortness of time." (*Ibid.*) The trial court denied the motion. (*Ibid.*)

The *Avila* court reversed. Defendant argued the judgment was not a default, default judgment, or dismissal, and thus the mandatory relief provisions of section 473(b) do not apply. (*Avila*, *supra*, 57 Cal.App.4th at p. 866.) The court disagreed, stating, "This case is directly analogous to a default judgment: Due to counsel's late filing of crucial documents, the court decided the matter on the other parties' pleadings. There was no litigation on the merits." (*Id.* at p. 868.) "'The purpose of the attorney affidavit provision "is to relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits." [Citations.]' [Citation.] That purpose is accomplished by the application of the mandatory provisions here. [¶] 'The law strongly favors trial and disposition on the merits. Therefore, any doubts in applying section 473 must be resolved in favor of the party seeking relief. When the moving party promptly seeks relief and there is no prejudice to the opposing party, very slight evidence is required to justify relief.'" (*Id.* at p. 868.)

Avila has not been well received, and most courts that have considered its rationale and holding have rejected it. (*See Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 683; *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 142-143, 147-148 (*English*); *Prieto v. Loyola Marymount University* (2005) 132 Cal.App.4th 290, 295-296; *Vandermoon v. Sanwong* (2006) 142 Cal.App.4th 315, 321; *Hossain v. Hossain* (2007) 157 Cal.App.4th 454, 457-458; *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1417;

Henderson v. Pacific Gas and Electric Co. (2010) 187 Cal.App.4th 215, 228; *Las Vegas Land and Development Company, LLC v. Wilkie Way, LLC* (2013) 219 Cal.App.4th 1086, 1090-1091.) The only two cases we are aware of to follow *Avila* are *In re Marriage of Hock & Gordon-Hock* (2000) 80 Cal.App.4th 1438, 1443-1446, and *Yeap v. Leake* (1997) 60 Cal.App.4th 591, 600-601. The same district and division that decided *Yeap v. Leake*, however, later withdrew its support for *Avila*. (*Hossain v. Hossain, supra*, 157 Cal.App.4th at pp. 457-459.)

The most persuasive of the cases rejecting *Avila* is *English, supra*, 94 Cal.App.4th 130. In *English* the defendant moved for summary judgment, but rather than file an opposition, plaintiff simply requested a continuance to conduct further discovery. (*Id.* at p. 133-134.) The court denied the continuance, and with no opposition filed, granted summary judgment. (*Id.* at p. 134.) The plaintiff subsequently moved to vacate the judgment pursuant to section 473(b) and submitted an attorney declaration of fault. (*English*, at p. 134.) The court denied the motion (*ibid.*), and the *English* court affirmed, concluding "the mandatory provision of section 473(b) does not apply to summary judgments because a summary judgment is neither a 'default,' nor a 'default judgment,' nor a 'dismissal' within the meaning of section 473(b)." (*Id.* at p. 133.)

As here, the plaintiff in *English* relied primarily on *Avila*. (*English*, *supra*, 94 Cal.App.4th at p. 137.) In declining to follow *Avila*, the *English* court began with the history of the mandatory provisions of section 473(b), which it noted, when originally enacted in 1988, applied only to default judgments. (*English*, at p. 138.) "The Legislature's focus on providing mandatory relief from default judgments, but not from other types of judgments, apparently stemmed from reluctance by the trial courts to grant discretionary relief from default judgments because of increased caseloads." (*Id.* at p. 139.) The Legislature amended the statute in 1991 to include, in addition to a default judgment, a default. (*Ibid*; see Stats. 1991, ch. 1003, § 1.) In 1992, the Legislature amended section 473(b) to include dismissals based on the State Bar's argument "'"that it

is illogical and arbitrary to allow mandatory relief for defendants when a default judgment has been entered against them due to defense counsel's mistakes and to not provide comparable relief to plaintiffs whose cases are dismissed for the same reason."'" (*English*, at p. 140; see Stats 1992, ch. 876, § 4.)

Against this historical backdrop, the *English* court turned to the language of section 473(b). It noted that the words "default" and "default judgment" have a specific meaning in the context of civil procedure and that a summary judgment is neither of them. (*English*, *supra*, 94 Cal.App.4th at p. 143.) "Based on our construction of the statute, the *Avila* court's conclusion that a summary judgment is 'directly analogous to a default judgment' when the opposing party fails to file a timely opposition to the motion misses the point. [Citation.] It is not an appellate court's task, nor, indeed, its prerogative, when interpreting a statute, to extend the scope of the statute to encompass situations 'analogous' to those the statute explicitly addresses. Rather, an appellate court's task is simply to determine what the Legislature meant by the words it used, relying first and foremost on the words themselves." (*Id.* at p. 144.)

The court reached a similar conclusion with regard to dismissals: "'Without belaboring the obvious, it should suffice to say that, in the context of pleadings and motions, a dismissal is the withdrawal of an application for judicial relief by the party seeking such relief, or the removal of the application by a court.' [Citation.] Although Code of Civil Procedure section 581 describes various circumstances in which an action may be dismissed, either by the court or by a party, noticeably lacking is any provision describing a summary judgment in favor of a defendant as a 'dismissal.'" (*English*, *supra*, 94 Cal.4th at pp. 144-145.) A narrow interpretation of "dismissal," the court noted, is consistent with the properly narrow interpretation of "default" and "default judgment," and is also consistent with the legislative history. (*Id.* at p. 145.)

Finally, the court noted its narrow reading of the mandatory relief provisions is supported by the broader language of the discretionary relief provisions of

section 473(b): "By carefully differentiating between the scope of the discretionary provision of section 473(b) (which applies to 'a judgment, dismissal, order, or other proceeding') and the scope of the mandatory provision (which applies to a 'default' or a 'default judgment or dismissal'), the Legislature chose to limit the circumstances in which a court must grant relief based on an attorney's mistake, inadvertence, surprise, or neglect. Neither this court nor any other court is at liberty to substitute its judgment for that of the Legislature in determining how far the statute should reach, no matter what good intentions may urge such an action." (*English*, *supra*, 94 Cal.App.4th at p. 148.)

The rationale of the *English* court is more persuasive than that of the *Avila* court. While we appreciate the "understandable . . . quests to salvage cases lost by inept attorneys" (*English*, *supra*, 94 Cal.App.4th at p. 148), we agree that to interpret the mandatory relief provisions to cover summary judgments is to stretch them beyond their breaking point. That does not mean, of course, an aggrieved party has no options, only that the matter is subject to the discretionary provisions of section 473(b), which broadly apply to judgments and "other proceedings." We turn to those next.

"'A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse.'" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257.) "'A party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief.' [Citation.] In determining whether the attorney's mistake or inadvertence was excusable, 'the court inquires whether "a reasonably prudent *person* under the same or similar circumstances" might have made the same error. [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.' [Citation.] 'Conduct falling below the professional standard of care, such as failure to timely object or to

properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.'" (*Id.* at p. 258.)

Here, the only explanation offered by plaintiff's former counsel was, essentially, that he was too busy and did not properly calendar the motion — it is unclear whether this means it was not calendared at all or simply calendared on the wrong date. The trial court found plaintiff had not demonstrated excusable neglect, and the court's finding was well within its discretion. Plaintiff cites cases in which similar mistakes have been held to be excusable, but in most of those cases the reviewing court was *affirming* a trial court's decision to grant relief. In *People v. North River Ins. Co.* (2011) 200 Cal.App.4th 712, for example, the moving party's attorney failed to appear at a summary judgment hearing, and the trial court subsequently granted a motion to set aside the judgment under section 473(b). (*North River Ins. Co.* at pp. 716-717.) The court found no abuse of discretion. (*Id.* at 723.) We have no qualms with that decision. It is certainly within the court's discretion to grant relief on the basis of a miscalendared date. But to hold that the court abused its discretion in denying relief, we would essentially be holding that courts are obligated, as a matter of law, to grant relief every time an attorney miscalendars a deadline due to the press of business. We are unwilling to embrace such a broad rule.

The only case plaintiff cites where a court granted the relief she seeks here is *Nilsson v. City of Los Angeles* (1967) 249 Cal.App.2d 976 (*Nilsson*). The plaintiff in *Nilsson* appealed from an order denying her request to present a late claim against the City of Los Angeles pursuant to the Government Claims Act. (*Id.* at p. 978.) The plaintiff's attorney submitted a declaration stating "'that because of an error in calendaring in affiant's office, the Claim for Damages which should have been filed with the City of Los Angeles on or before April 7, 1964 was actually filed on May 19, 1964. The late filing of the Claim for Damages was entirely due to an office error in

calendaring a date, and clearly was not done for the purpose of prejudicing or in any manner hiding the fact that a claim was to be made. Further, immediately upon discovery of the late date, claim was presented and filed.'" (*Ibid.*) The trial court denied the plaintiff's request. (*Id.* at p. 977-978.) Analyzing the matter under the same standard as section 473, and finding an abuse of discretion, the Court of Appeal reversed. (*Nillson*, at pp. 982-983.) It stated, "While not every mistake of an attorney constitutes excusable neglect [citation], calendar errors by an attorney or a member of his staff are, under appropriate circumstances, excusable." (*Id.* at p. 980.) The court cited six cases to support this proposition, but none of them involved *reversing* a trial court based merely on a calendaring error.

We disagree with the holding in *Nilsson* because it gives insufficient deference to the trial court. Surely not every calendaring error is excusable as a matter of law. To hold otherwise would create a gaping loophole through which negligent attorneys could escape all manner of deadlines. The trial court is in the best position to assess the totality of the circumstances to determine whether the moving party has presented a worthy excuse. Our task is to reverse a court's ruling only where it "'"exceeded the bounds of reason."'" (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1339.) While we recognize that the failure to provide all details of the claimed excuse is not *per se* a bar to relief under section 473(b) (cf. *Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 279-280 (*Bettencourt*)), a court cannot fill in facts or create excuses out of thin air. The scant details provided both in *Nillson* and here regarding how the calendaring error was made provided no particularized basis to conclude the court abused its discretion.[2]

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[2] We recognize that our high court discussed the *Nilsson* decision approvingly in *Bettencourt, supra,* 42 Cal.3d at page 279. In *Bettencourt* the plaintiff petitioned for leave to file a late claim under the Government Claims Act. Plaintiff's counsel's excuse was that he presented a timely claim to the State of California under the mistaken belief that it was the relevant employer, when in fact a local community college

Plaintiff's final contention is that the court erred in refusing to exercise its inherent equitable authority to set aside the judgment on the basis of extrinsic fraud or mistake. We review a court's exercise of its inherent equitable authority for abuse of discretion. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.)

"To set aside a judgment based upon extrinsic mistake one must satisfy three elements. First, the defaulted party must demonstrate that it has a meritorious case. Secondly, the party seeking to set aside the default must articulate a satisfactory excuse for not presenting a defense to the original action. Lastly, the moving party must demonstrate diligence in seeking to set aside the default once it had been discovered." (*Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1147-1148.) In this context, the terms "fraud" and "mistake" are "given a broad meaning and tend to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing. It does not seem to matter if the particular circumstances qualify as fraudulent or mistaken in the strict sense." (*In re Marriage of Park* (1980) 27 Cal.3d 337, 342.) The extrinsic circumstance plaintiff relies on here is that, to the extent her attorney's conduct was inexcusable, it amounted to abandonment by her attorney. We reject plaintiff's argument because her attorney's conduct did not amount to abandonment.

"As a general rule an attorney's inexcusable neglect is chargeable to the client. [Citation.] Excepted from the rule are those instances in which the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence; this exception is premised upon the concept the attorney's conduct, in effect, obliterates the existence of the attorney-client relationship. [Citation.] However, delay alone does not constitute client abandonment or

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district was. (*Bettencourt*, at p. 274.) On appeal, the defendant argued the plaintiff had averred insufficient details as to how the mistake was made and how it was ultimately discovered. *Bettencourt* cited *Nilsson* to support its conclusion that lack of detail does not necessarily bar a claim for relief. (*Bettencourt*, at pp. 279-280.) We do not interpret *Bettencourt* as endorsing the holding in *Nilsson* more generally.

positive misconduct." (*Baccus v. Superior Court* (1989) 207 Cal.App.3d 1526, 1533.) Rather, for the client to be absolved of inaction, there must be "'consistent and long-continued inaction'" (*Fleming v. Gallegos* (1994) 23 Cal.App.4th 68, 72); a "history of delay and neglect" (*Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 390) that "effectually and unknowingly deprived [plaintiff] of representation." (*Id*. at p. 391) Our high court has cautioned us to apply this exception "narrowly:" "'The policy that the law favors trying all cases and controversies upon their merits should not be prostituted to permit the slovenly practice of law or to relieve courts of the duty of scrutinizing carefully the affidavits or declarations filed in support of motions for relief to ascertain whether they set forth, with adequate particularity, grounds for relief. [Fn. omitted.] When inexcusable neglect is condoned even tacitly by the courts, they themselves unwittingly become instruments undermining the orderly process of the law.' [Citation.] Given this concern, the *Daley* exception should be narrowly applied, lest negligent attorneys find that the simplest way to gain the twin goals of rescuing clients from defaults and themselves from malpractice liability, is to rise to ever greater heights of incompetence and professional irresponsibility while, nonetheless, maintaining a beatific attorney-client relationship." (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 900.)

Plaintiff has presented no facts here that would amount to abandonment. To the contrary, plaintiff, presumably through counsel, amended the complaint, filed case management statements, demurred to answers, ultimately, if belatedly, filed opposition papers to the summary judgment motion, and appeared on the date of the hearing to orally oppose the summary judgment motion. Plaintiff's counsel's negligence may have been inexcusable, but it was not abandonment. Accordingly, it is attributable to the client, and there is no extrinsic fraud or mistake that compelled the court to vacate the judgment.

DISPOSITION

The postjudgment order is affirmed. Defendants shall recover their costs incurred on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.